**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR**

**TUESDAY, THE 24TH JULY 2007 / 2ND SRAVANA 1929**

**SA.No. 166 of 1994(C)**
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**(AGAINST DECREE DATED 29/06/93 OF THE LEARNED SUB JUDGE OF PAYYANNUR IN AS.130/1989 AGAINST DECREE DATED 20/06/1999 OF THE LEARNED MUNSIFF OF TALIPARAMBA IN O.S.22/1983)**

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**APPELLANT: APPELLANT-PLAINTIFF:**
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**PULUKKOOL MAMMAD KUNHI, S/O.MOOSAN,**
**EZHOME AMSOM, KOTTILLA DESOM,**
**WARD NO.11, HOUSE NO.172, DIST.KANNUR.**

**BY ADV. SRI.C.P.KUNJHIKANNAN**
**SMT.VIDHYA. A.C**

**RESPONDENTS: RESPONDENTS-DEFENDANTS:**
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***1. PULUKKOOL UMMER HAJI,**
**S/O.MAMMU, RESIDING AT WARD NO.1, HOUSE NO.149,**
**PATTUVAM AMSOM, DESOM, DIST.KANNUR. ( D I E D)-**
**LR'S IMPLEADED:**

****2. K.K.PURAYIL MOOSAN,**
**S/O.UMMER HAJI, RESIDING AT WARD NO.1, HOUSE NO.149,**
**PATTUVAM AMSOM, DESOM DIST. KANNUR.( D I E D)-**
**LR'S IMPLEADED:**

***ADDL.R3 TO R14 ARE IMPLEADED:**

**R3. AASIYYA, D/O.PULUKKOL UMMER HAJI, AGED 40 YEARS,**
**RESIDING AT PATTUVAM AMSOM, WARD NO.1, HOUSE NO.149,**
**PATTUVAM PANCHAYAT (P.O.), DIST. KANNUR.**

**.2/-**

S.A.NO.166/1994

R4. KADHEEJA, AGED 40 YEARS,
RESIDING AT PATTUVAM AMSOM WARD NO.1, HOUSE NO.149,
PATTUVAM PANCHAYAT (P.O.), KANNUR.

R5. MARIAM, AGED 36 YEARS, ....DO..DO....

R6. KHADER, AGED 34 YEARS, ....DO..DO...

R7. HAMSA, AGED 32 YEARS, .....DO..DO.....

R8. CHAPPAN KHADEEJA, W/O.MUHAMMED KUNHI, AGED 43 YEARS,
KHADEEJA MANZHIL, ONAPARAMBA, P.O. KOTTILA, DT.KANNUR.

R9. RASHEEDA, AGED 22 YEARS, D/O.MUHMMED KUNHI, ...DO..DO...

R10. FAROOQ, AGED 20 YEARS, S/O.MUHAMMED KUNHI, ..DO..DO....

R11. SHAKEELA, AGED 18 YEARS, D/O.MUHAMMED KUNHI,.DO.DO...

R12. FASIL, AGAED 16 YEARS, S/O.MUHAMMED KUNHI, ...DO.DO.....

R13. FAISAL, AGED 14 YEARS, S/O.MUHAMMED KUNI, ...DO..DO.....

R14. NAUFAL, AGED 12 YEARS, MINOR, S/O.MUHAMMED KUNHI,.DO.DO.

MINOR RESPONDENTS 12 TO 14 REPRESENTED BY THEIR GUARDIAN AND MOTHER, THE 8TH RESPONDENT CHAPPAN KHADEEJA.

(* 2ND RESPONDENT IS RECORDED AS ONE OF THE LRS OF THE DECEASED 1ST RESPONDENT AND ADDL.RESPONDENTS 3 TO 14 ARE IMPLEADED AS THE LRS OF DECEASED 1ST RESPONDENT AS PER ORDER DTD. 27/01/05 IN C.M.P.1036/2000)

**ADDL.R15 TO R20 ARE IMPLEADED:

R15. PALLAKKAL NAFEESA, AGED 42 YEARS,
W/O.MOOSAN, AMINA MANZIL,
NHATTUVAYAL, TALIPARAMBU,
DISTRICT KANNUR.

R16. PALLAKKAL AMINA, D/O.MOOSAN,
AMINA MANZIL, NHATTUVAYAL, TALIPARAMBU,
DISTRICT KANNUR.

R17. PALLAKKAL KHAIRUNNISA, .....DO....DO.....

R18. PALLAKKAL MISRIYA, .....DO....DO.....

R19. PALLAKKAL SUNIRA (MINOR AGED 16 YEARS),
S/O.MOOSAN, .....DO...DO....

R20. PALLAKKAL MAHAMMED ASHRAF, (MINOR AGED 14 YEARS),
.....DO..DO.....

RESPONDENTS 19 & 20 ARE REPRESENTED BY THE MOTHER OF 15TH RESPONDENT NAFEESA, ....DO...DO...

**ADDL.RESPONDENTS 15 TO 20 ARE IMPLEADED AS THE LRS OF DECEASED 2ND RESPONDENT AS PER ORDER DTD. 28/06/2005 IN CMP.NO.1189/2000.

BY ADV. SRI.O.RAMACHANDRAN NAMBIAR)
SRI.K.V.M.ABDUL KHADER ) for R2

SRI.P.M.PAREETH for R7 to R13, R15 to R20

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 24/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**M.SASIDHARAN NAMBIAR,J.**

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S.A.NO.166 OF 1994

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Dated 24th July 2007

**J U D G M E N T**

Plaintiff in O.S.22 of 1983 on the file of Munsiff court, Taliparamba is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for permanent prohibitory injunction in respect of 2.50 acres in R.S.No.100/2A of Thadikkadavu village. Jenm right of plaint schedule property and surrounding property admittedly originally belonged to Devaswom. According to appellant under Ext.A1 registered assignment deed, Pulikkal Abdulla obtained northern portion of plaint schedule property being 1.50 acres and under Ext.A2 he assigned it in favour of appellant and later under Ext.A4 appellant assigned it in favour of Abdurahiman. It was contended that remaining southern portion of plaint schedule property having an extent of 1 acre was also assigned by the same Abdulla in favour of Abdurahiman under Ext.A3 and while Abdurahiman was thus in possession of the entire properties, under

Ext.A5 assignment deed dated 18/5/1964 it was sold to Madathil Abdulla, who in turn assigned it in favour of Hamza under Ext.A6 sale deed dated 14/10/1965 and thereafter Hamza under Ext.A8 assigned the property in favour of appellant and his brothers and appellant has been in possession of the property and respondents have no manner of right or possession of the same and they attempted to trespass into plaint schedule property and therefore they are to be restrained by a decree for permanent prohibitory injunction. It was contended that Hamaa had purchased jenm right over the property under Ext.A7 purchase certificate before the property was assigned under Ext.A8.

2. Respondents resisted the claim contending that appellant or his brothers have no right or possession to plaint schedule property and first respondent was put in possession of 3 acres in R.S.100/2A and he has been in possession of the property since then and appellant is not entitled to the decree sought for.

3. Learned Munsiff originally granted a decree which was set aside by the first appellate court in A.S.130 of 1989. Before first appellate court a

commission was taken out. First appellate court found that the plan prepared by the Commissioner in the appeal and plan prepared by the Commissioner before the trial court were diametrically opposite and therefore both of them cannot be relied on. Learned District Judge set aside the reports, plans and decree and judgment passed by trial court and remanded the suit for fresh disposal directing trial court to issue a fresh commission for identification of the property with the aid of surveyor. Trial court thereafter appointed a senior counsel as commissioner who submitted Ext.C6 report and C7 plan. After the report and plan were remitted back to the Commissioner, he submitted Ext.C8 plan. Learned Munsiff on the evidence found that appellant did not establish the identity and possession of plaint schedule property and therefore held that appellant is not entitled to the decree sought for. Appellant challenged it before Sub court, Payyannur in A.S.130 of 1989. Learned Sub Judge on re-appreciation of evidence finding that boundaries in Ext.A8 title deed of appellant and his brothers differ from the boundaries of plaint schedule property held that appellant did not establish his right and possession over

the plaint schedule property and confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in this appeal.

4. Appeal was admitted formulating following substantial questions of law.

> 1) Whether the findings of courts below are vitiated by misreading of evidence, oral and documentary.
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> 2) Whether courts below were not bound by the findings in A.S.199 of 1984 that if Exts.C1 and C2 plans were found to be true, plaintiff is entitled to a decree for injunction and when Exts.C6 to C8 tally with Exts.C1 and C2 whether courts below were justified in dismissing the suit.

5. Learned counsel appearing for appellant and respondents were heard.

6. Being a suit for injunction appellant can succeed only on establishing identity of the plaint schedule property as well as his possession. What was contended by the appellant was that under Ext.A8 he has title to plaint schedule property along with his brothers

and he is in possession of the property and respondents have no right over the same and they are to be restrained by decree for injunction. Right obtained under Ext.A8 is the right and possession which was available to Hamza under Ext.A7 purchase certificate and Ext.A6 sale deed. Under Ext.A6 Abdulla obtained right from Abdurahiman who in turn obtained right under Ext.A3, A4 and A2 assignment deeds executed on the same day. Ext.A4 assignment deed was executed by the appellant and Ext.A3 by his brother Abdulla, assignor under Ext.A1. The right assigned under Ext.A4 by the appellant is the right obtained under Ext.A2 from Ali who in turn obtained that right under Ext.A1 from Abdulla, the same assignor under Ext.A3. According to appellant property covered under Ext.A1 is the northern portion and property covered under Ext.A3 is the southern portion and together is the plaint schedule property. Learned Munsiff and learned Sub Judge on appreciation of evidence found that plaint schedule property is not proved to be the same property covered under Exts.A1 and A3 which was subsequently transferred under Ext.A8. Argument of learned counsel appearing for appellant is that courts below did not appreciate the

evidence and if evidence was properly appreciated identity could have been upheld as claimed by appellant and decree should have been granted. Though it was contended in the appeal memorandum and substantial question of law was framed that finding of first appellate court in the earlier first appeal that if identification of Ext.C2 is correct appellant is entitled to get a decree and as Ext.C7 plan is identical to Ext.C2 plan and so courts below should have granted a decree, what was found by first appellate court in the order of remand was only that if identification in Ext.C2 plan is correct appellant is entitled to get decree and not that identification is correct. In fact, first appellate court found that Ext.C2 plan and the plan submitted before the first appellate court are diametrically opposite. As a result both plans cannot be relied on. In fact as per the order of remand all the reports and plans available till then were set aside. Therefore appellant cannot rely on Ext.C2 plan to raise any such contention and such a substantial question of law though formulated is not involved in the appeal.

7. Though learned counsel appearing for appellant

tried to argue that persons who are found to be in possession of the property, which lies on the boundaries of plaint schedule property are legal heirs of those persons who were referred to under Exts.A1 to A8, there is no evidence to support the argument. More over, if property covered under Ext.A3 forms southern boundary of the property transferred under Ext.A1 as canvassed by the appellant, then the southern boundary of the property transferred under Ext.A1 could only be the property covered under Ext.A3 and it cannot be the property in the possession of Abbas alone. As per Ext.A1 property having an extent of 1 acre 50 cents, which according to the appellant is plot B under Ext.C7 plan, namely northern plot. If so the property which lies immediately to south cannot be completely plot A and at least a portion should be the property in the possession of Abbas. If that be so, identification made by the Commissioner in Ext.C7 plan cannot be correct. More over, boundaries shown in Ext.C7 purchase certificate obtained by Hamaa do not tally with the boundaries in Ext.A8, whereunder Hamza transferred his rights in favour of appellant. Viewed from this angle, findings of courts below that appellant

did not establish that plaint schedule property is the property covered under Ext.A8, which in turn was the property covered under Exts.A1 and A3 is perfectly correct. Therefore, on the failure of appellant to establish identity of plaint schedule property as the property obtained under Ext.A8 and also possession courts below rightly dismissed the suit. There is no merit in the appeal. Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

**JUDGMENT**

S.A.NO.166 OF 1994

24th JULY 2007

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